No. 13,863

IN THE

United States Court of Appeals

For the Ninth Circuit

JOAO SIMOES BARREIRO,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

The so-called statement of the facts set forth in the brief of appellee is wholly insufficient and inaccurate. We respectfully commend to the consideration of this Honorable Court the statement of the evidence set forth in appellant's opening brief, pages 2-29, particularly those portions thereof which deal with appellant's futile attempts to withdraw his claim of exemption, and his equally futile, though earnest and repeated attempts to enlist in the armed forces of the United States. All of these matters are established without conflict by the record, and we shall turn, therefore, to certain misstatements, which we assume are wholly inadvertent, by the learned counsel for the Government.

I.

"APPELLANT HAS NEVER ABANDONED HIS CONTENTION THAT HE CLAIMED EXEMPTION AS A NEUTRAL ALIEN ON THE ADVICE OF HIS DRAFT BOARD."

It is quite obvious that the Government is now receding from, if not entirely retracting, its prior contention that a claim of exemption once made is wholly irrevocable and cannot be recalled, and that once it is signed, the alien, in the language of Catullus, has gone down the long road from which there is no returning.

We shall see presently that the law gives no sanction to such a contention, but permits one who has been ill-advised, or who has executed a document by reason of mistake, fraud, or undue influence, to rescind the instrument and secure its cancellation.

That this view cannot be sustained we shall show presently with citation of authorities which are both numerous and well considered.

In the brief of counsel for appellee it is stated at page 6:

> "Appellant, in the District Court, contended that his filing of the form DSS 301 was on the advice of his Draft Board and that therefore he should have been excused from the effect of filing the form. As the appellant does not advance this contention before this Court it is assumed to have been abandoned."

Nothing could be farther from the truth. The matter was argued at great length in proceedings both before the Immigration and Naturalization Service

of the U. S. Department of Justice, and in the prior proceedings before this Court on habeas corpus. (No. 27563H.) In that proceeding, Judge Harris of this Court remanded the cause for further hearing before the Immigration and Naturalization Service. That body, as appears from the record, merely adhered to its first decision without passing upon certain important questions that had been raised in the interim and overruling every point raised by the appellant by mere *ipse dixit*. That we have raised in this Court the question which the Government contends we did not raise will be apparent from a few brief references to the opening brief of the appellant.

Thus we find that the point is raised at page 5 of appellant's opening brief, in which we said:

> "The sole ground upon which the Government insists upon tearing plaintiff from his wife and children and giving them the terrible alternative of expatriating themselves and following him into exile, or bidding him an eternal farewell, is that plaintiff, after he had vainly endeavored to enlist in the Armed Forces of the United States, acted on the improvident advice of his local draft board during the second World War and claimed exemption from military service as a neutral alien.
>
> "This claim he endeavored to withdraw.
>
> "As long ago as March 28, 1945 the Department of Justice ruled that he might withdraw his claim for exemption and stayed the order of deportation to permit him to do so.
>
> "He promptly withdrew 'unqualifiedly and unreservedly' the claim of exemption. (T.R. 128.)

"Again acting under advice of his local board, he volunteered for induction and service in the Armed Forces of the United States, again withdrawing any and all claim of exemption from military service. (T.R. 130.)

"It is now the arbitrary, and, we submit, the inhuman contention of the Department of Justice that a claim of exemption, once made, no matter in what circumstances or under what conditions, —is irrevocable, and cannot be withdrawn.

"The department has thus reversed its own former ruling. It has affronted not only the fundamental principles of equity which grant relief against mistakes of both law and fact, but the law of humanity as well. The trial judge has upheld this ignoble and reprehensible conduct of the department." (Appellant's Opening Brief, p. 5.)

We raised the point again when we cited the well-considered decision of the Supreme Court in *Moser v. U. S.*, 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729. For our comment upon this case see appellant's opening brief, p. 36. In the said brief we stated at page 37:

"Plaintiff is clearly entitled to relief from the consequences of the claim improvidently signed in reliance upon the advice of his draft board, without being advised as to the legal consequence of the claim that he would be thereafter barred from citizenship."

II.

THE APPELLANT DID NOT ELECT TO WAIVE HIS RIGHT TO BECOME A CITIZEN WHEN HE SIGNED A CLAIM OF EXEMPTION UNDER THE ADVICE OF HIS DRAFT BOARD.

At page 11 of the Government's brief, it is stated:

> "The appellant in this action did have 'an opportunity to elect' and did elect to 'being exempt as a citizen.' He had the assistance of a notary public in preparing DSS 301."

Of what value, we ask, is the advice of a notary public on a matter of law?

Lawyers and judges disagree as to the construction and effect of the statute.

What right has a notary to give advice as to the effect of a document, and its consequences to the claimant?

But that is not all. There is no evidence in the record that the notary ever advised appellant that by claiming exemption, he became debarred from American citizenship.

III.

THE GOVERNMENT HAS ATTEMPTED NO ANSWER TO THE DECISIONS CITED IN APPELLANT'S OPENING BRIEF.

It has been the contention of the immigration authorities from the beginning that the appellant had no right to withdraw his claim of exemption; that having once made it his action was irrevocable and that he could never thereafter claim the right to suspen-

sion of his deportation under the Dies Act. In other words, the Immigration Service contends that there are no principles of equity embodied in the law relating to citizenship, deportation and naturalization.

We submit that this is an affront to the most elementary principles of equity jurisprudence.

We need not, however, go back to the Chancery reports for authorities. We cited them in our opening brief.

Moser v. U. S., 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729;

Machado v. McGrath, 193 Fed. (2d) 706;

Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S. Ct. 374, 92 L. Ed. 433.

In appellant's opening brief pages 33 to 36, we showed, with citation of authorities, that this action for declaratory relief being a suit in equity is governed by equitable principle, and that the Court has the full power to grant relief on the ground of mistake of fact, and even, in proper conditions, against a mistake of law. Recent decisions of the Supreme Court of the United States adhere to this rule.

Where, as here, a mistake of law was induced and shared by one to whom the mistaken party would normally look for guidance as to the law, the Courts will grant relief.

Staten Island Storage Co. v. United States, 85 Fed. (2d) 68;

Dowd v. United States, 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215;

Ackerman v. United States, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207.

Even in cases in which a purely statutory right, such as the taking of an appeal from a judgment within a particular time, is involved, the Courts will grant relief where the failure to appeal has been due to the act of the adverse party. Thus in *Dowd v. United States, supra,* an inmate of a penitentiary undergoing a life sentence was prevented from taking an appeal because the prison authorities had placed a ban on sending papers out of the prison. Even though the right of appeal is purely a statutory right, the Supreme Court of the United States unanimously held that the defendant was entitled to relief, and the high Court remanded the cause with direction to the District Court to allow the state a reasonable time in which to afford the prisoner the full appellate review he would have received but for the suppression of his papers, failing in which he should be discharged. In our opening brief we cited the case of *Moser v. United States,* 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729, in which it was held that an alien who applied for exemption from military service was not disbarred from becoming an American citizen where his application did not contain a waiver of his rights of citizenship, and which he signed on the advice of the legation of his own country. We quoted the pertinent language of this case at page 36 of appellant's opening brief, and on page 37, the language of *Machado v. McGrath,* 193 Fed. (2d) 706.

All that the Government has to offer to offset these decisions of the Supreme Court of the United States and the Court of Appeals are *In re Martinez,* 73 F. Supp. 101; *In re Molo,* 107 F. Supp. 137; *Petition of Perez,* 81 F. Supp. 591—all decisions of *nisi prius* courts, which are not binding upon any other judge, even in the district in which they were rendered.

In *Klapprott v. United States,* 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266, the Supreme Court of the United States set aside a judgment by default in a proceeding to revoke a certificate of naturalization on the ground that the person naturalized had falsely sworn allegiance to the United States.

While the factual situation in these cases may be differentiated in some particulars from those of the case at bar, the principle pronounced in all of the decisions is the same. The decision in the *Klapprott* case was unanimous, though five different opinions were written in which the justices expressed their individual views. The opinion of Justice Rutledge, with whom Justice Murphy concurred, will bear quotation:

> "To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover over-time pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.
>
> "To take away a man's citizenship deprives him of a right no less precious than life or lib-

> erty, indeed of one which today includes those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power."

Counsel for the Government attempt to distinguish the *Moser* case from the case at bar by asserting that *Moser* acted upon the advice of the Swiss legation and was misled by the legation's misapprehension of the law.

We submit that the case of Barreiro is even stronger than that of Moser. Barreiro acted, not on the advice of a foreign legation, but upon that of his own draft board, which presumably knew the law, and knew that there was a statute which rendered an alien who claimed exemption from military service ineligible thereafter to become a citizen. Once more we reiterate our insistence that Barreiro was misled into filling out the form claiming exemption as a neutral alien on the advice of his draft board.

We further call attention to the fact, which we set forth at page 22 of appellant's opening brief, and which the United States attorney makes absolutely no attempt to answer or refute,—that the appeal board of the Department of Justice itself deferred the deportation of appellant *"for the purpose of giving him an opportunity to withdraw his application for exemption from the draft."*

The order further proceeds:

> "In the event form 301 is withdrawn the case is to be reopened *to permit him to show that he no longer claims exemption from military service on account of alienage.*"

At page 23 of appellant's opening brief, we set forth the communications addressed by the petitioner to the Department of Justice and to his local selective board, *"unqualifiedly and unreservedly"* withdrawing the claim of exemption.

Having done this, how can it now be claimed by the Government that the withdrawal of the claim was ineffectual?

IV.

THE FAILURE OF THE DISTRICT COURT TO MAKE FINDINGS ON THE MATERIAL ISSUES IN THE CASE.

The findings of fact and conclusions of law made by the District Court are set forth at page 27 of appellant's opening brief.

In arguing that the judgment must be reversed for the failure of the District Court to make findings on the material issues and for the error of the Court in denying appellant's motion to amend, change, alter, and substitute findings, we showed that the trial judge made no finding as to the allegations of the complaint set forth at page 10 of appellant's opening brief. There is likewise no finding on the allegation

of the complaint as to the numerous and futile efforts of appellant to enlist in the various branches of the armed forces, nor is there any finding upon the allegations that the deportation of appellant would result in serious economic detriment to his wife and children, all of whom are citizens of the United States.

We submit that the appellant was entitled to specific findings upon each of these material allegations; but the trial judge did not even make a general finding as to any of them.

In appellant's opening brief, commencing at page 39, we cited numerous decisions to the effect that the failure to find upon a material issue renders the decision against law, for which a new trial must be granted. Citation of further decisions to this point is unnecessary. The rules take care of the question:

> "In all actions tried upon the facts without a jury, or with an advisory jury, *the Court shall find the facts specially* and state separately its conclusions of law thereon, and direct the entry of the appropriate judgment."
>
> *Federal Rules of Civil Procedure,* Rule 52(a).

CONCLUSION.

It is submitted that the brief of appellee, like the findings of the Court, fails to answer, or even to mention, the all-important issues in the case. The Supreme Court of the United States has set its face intransigently against the unjust and inhumane atti-

tude of the Government. It is respectfully submitted, therefore, that the judgment appealed from should be reversed, and the cause remanded to the District Court with directions to grant appellant the relief prayed for in his complaint.

Dated, San Francisco, California,
November 2, 1953.

JOSEPH A. BROWN,
Attorney for Appellant.